UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

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Petitioner,	
v. JERI-ANN SHERRY,	CIVIL NO. 2:06-CV-15387 HONORABLE PAUL D. BORMAN UNITED STATES DISTRICT COURT
Respondent.	

ORDER COMPELLING ANSWER ADDRESSING HABEAS PETITION ON THE MERITS AND THE PRODUCTION OF THE RULE 5 MATERIALS

Thomas Edward Gurk, ("Petitioner"), presently confined at the Ionia Maximum

Correctional Facility in Ionia, Michigan, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, in which he challenges his convictions for second-degree criminal sexual conduct. Respondent has filed an answer to the petition for writ of habeas corpus, which is construed as a motion to dismiss the petition on the ground that petitioner has failed to exhaust his claims with the state courts. *See e.g. Alvarez v. Straub*, 64 F. Supp. 2d 686, 689 (E.D. Mich. 1999). Respondent, however, has failed to address the merits of petitioner's claims. Petitioner has not responded to respondent's answer. However, having reviewed the pleadings and the issues raised by petitioner in his habeas application, the Court finds that an answer addressing the merits of the petition is necessary for the proper adjudication of this matter.

A habeas petitioner challenging the legality of his or her state custody is entitled to a reasonably prompt disposition of his or her habeas petition. *Ukawabutu v. Morton*, 997 F. Supp. 605, 610 (D.N.J. 1998). Respondent in this case simply filed what amounts to a motion to dismiss without addressing the merits of petitioner's claims. An answer to a habeas petition is not like an answer to a civil complaint. It should respond to the allegations of the habeas

petition. *Id.* at 608-09; *See also Chavez v. Morgan*, 932 F. Supp. 1152, 1153 (E.D. Wis. 1996)(a motion to dismiss is generally not the appropriate pleading in response to a petition for writ of habeas corpus; an appropriate response is an answer which responds to each allegation contained in a habeas petition). Therefore, unless a federal court grants a respondent leave to file a motion to dismiss, an answer to a habeas petition should respond in an appropriate manner to the factual allegations contained in the petition and should set forth legal arguments in support of respondent's position, both the reasons why the petition should be dismissed and the reasons why the petition should be denied on the merits. *Ukawabutu*, 997 F. Supp. at 609. The practice of filing "piecemeal" motions is inconsistent with the Rules Governing Section 2254 Cases in the United States District Courts, with 28 U.S.C. § 2254(b)(2), which gives district courts the discretion to consider and deny unexhausted claims on their merits, and with fundamental principles of efficient case management. *Id.* at 607.

In the present case, it is unclear whether petitioner's claims have been properly exhausted with the state courts. Compounding the difficulty of resolving the exhaustion question is the fact that respondent has failed to file the Rule 5 materials in this case, even though she was ordered to do so twice by this Court, first in the Order of Responsive Pleadings signed on December 7, 2006, and again in a Second Order Compelling Production of the State Court Record, signed on July 12, 2007.

This Court has the discretion under the rules governing responses in habeas corpus cases to set a deadline for a response to petitioner's habeas petition. *Erwin v. Elo*, 130 F. Supp. 2d 887, 891 (E.D. Mich. 2001); 28 U.S.C. § 2243. In light of the time that has passed in this case, the Court will order that a supplemental answer be filed within forty five days of the Court's order which addresses the substance of petitioner's claims.

The Court will also order respondent to provide this Court with the Rule 5 materials at the time that it files its answer. The habeas corpus rules require respondents to attach the

relevant portions of the transcripts of the state court proceedings, if available, and the court may

also order, on its own motion, or upon the petitioner's request, that further portions of the

transcripts be furnished. Griffin v. Rogers, 308 F. 3d 647, 653 (6th Cir. 2002); Rules Governing §

2254 Cases, Rule 5, 28 U.S.C. foll. § 2254. "When this information is required, it is the State's

responsibility to provide it." Griffin, 308 F. 3d at 654.

Accordingly, the Court ORDERS Respondent to submit an answer which addresses the

merits of Petitioner's habeas claims within 45 DAYS of the date of this order. Respondent is

further ordered to file the entire state record with the Court at the time that it files its answer.

Respondent is again free to respond to any of the issues raised by the Court in this opinion

regarding the exhaustion issue. Petitioner shall then have 45 DAYS in which to file any reply to

Respondent's supplemental pleading.

s/Paul D. Borman

PAUL D. BORMAN

UNITED STATES DISTRICT JUDGE

Dated: September 7, 2007

CERTIFICATE OF SERVICE

Copies of this Order were served on the attorneys of record by electronic means or U.S. Mail on

September 7, 2007.

s/Denise Goodine

Case Manager

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